Office Supreme Court U.S.
FILED
OCT 28 1899
JAMES H. MCKENNEY,
Clerk

No. 376.

In the Supreme Court
Brief of Shepard for D. C. on m
Of the United States.

Filed OCTOBER TERM, 1899. Oct. 28, 1899.

T. O. ABBOTT,
Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF TACOMA, a corporation; CHESTER THORNE; J. W. WALLACE; EDWARD HUGGINS; W. H. BOGLE AND CHARLES RICHARDSON, partners as BOGLE & RICHARDSON,
Defendants in Error.
NO. 376.

In Error to the Supreme Court of the State of Washington.

Brief for Defendants in Error on Motion to Strike or Affirm.

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In the Supreme Court of the United States

For the.....term, 189..

T. O. ABBOTT, *Plaintiff in Error,* *vs.* NATIONAL BANK OF COMMERCE OF TACOMA, a corporation; CHESTER THORNE; J. W. WALLACE; EDWARD HUGGINS; W. H. BOGLE AND CHARLES RICHARDSON, partners as BOGLE & RICHARDSON, *Defendants in Error.*	NO.....

MOTION TO DISMISS OR AFFIRM.

Comes now the defendants in error, by their attorneys, Messrs. Bogle and Richardson, and moves the court to dismiss the writ of error herein for want of jursidiction, because the judgment or decree from which the said writ or error purports to have been taken is the judgment or decree of the supreme court of one of the United States, to-wit, the supreme court of the State of Washington.

And the said defendants in error, by their counsel aforesaid, also move the court to affirm the said judgment or decree of the supreme court of the State of Washington from which said writ of error was taken, because it is manifest from the record therein that the question upon which such jurisdiction depends is so frivolous as not to need further argument.

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Brief for Defendants in Error on Motion to Strike or Affirm.

Plaintiff in error brought an action in the superior court of the State of Washington against the defendants in error for damages for an alleged libel averred to have been published by them of and concerning him in a certain pleading filed by the defendants in error in a proceeding in the circuit court of the United States for the district of Washington, wherein the said National Bank of Commerce of Tacoma was complainant, and F. M. Wade, A. F. McClaine and J. C. Weatherred were defendants. The individual defendants in error were alleged to have been directors and attorneys of said banking association, and to have aided, advised and abetted it in said alleged libellous publication. The complaint in the action for the libel alleged that the defamatory matter complained of was false and malicious; that defendants had no probable cause

to believe it to be true; that said supposed defamatory matter was not pertinent nor material to the subject matter of the suit in which the pleading containing it was filed, and that the court in which said pleading was filed had no jurisdiction of the cause of action therein set up; and, further, that the plaintiff was not a party to the action in which the pleading was filed.

The defendants in error, in the third defense set up in their answer, averred that the supposed defamatory matter was used in a certain bill of complaint filed by said National Bank of Commerce against F. M. Wade, A. F. McClaine and J. C. Weatherred, in a cause pending in the circuit court of the United States, District of Washington, and not otherwise, and set out said bill of complaint *in extenso*, and claimed it was privileged.

The plaintiff in error, in reply, admitted that the defamatory matter was used in said pleading, and that said pleading was correctly set out in said answer; but averred that the statements in said pleading concerning the plaintiff were false and malicious, and not relevant nor material to the proceeding in said circuit court, and that said circuit court had no jurisdiction of the proceeding.

Defendants in error thereupon moved for judgment upon the pleadings, in accordance with the course of practice in the state court, upon the ground that it affirmatively appeared from the bill of complaint set out *in extenso* in the answer that the circuit

court of the United States had jurisdiction of the subject matter of said action; and that it also affirmatively appeared from said bill of complaint that the supposed defamatory matter contained therein was relevant and material to the cause of action therein set up; and that, as a matter of law, such pleading was absolutely privileged, whether true or false, malicious or otherwise, and no right of action could be based thereon.

This motion was sustained by the superior court, and judgment final was entered in favor of defendants. Plaintiff in error thereupon appealed to the state supreme court, and upon full hearing and full consideration, that court affirmed the judgment of the lower court. The opinion of the court is reported 56 Pacific Reporter, 376, —— Wash., ——. It will be seen from that opinion that the decision was rested upon questions of general law, the court adopting the rule that words used in the course of a judicial proceeding, pertinent and material to the matter before the court and in a proceeding of which the court has jurisdiction, are absolutely privileged, upon grounds of public policy, regardless of whether they are true or false, used maliciously or in good faith.

I.

The decision of the state court did not draw in question the validity of any statute of the United States, nor any authority exercised under the Federal Constitution; nor did it involve any state statute

which was claimed to be repugnant to the constitution, treatises or laws of the United States. The defense of privilege was sustained upon principles of general law, without reference to any statute or constitutional enactment, state or federal. The record does not show that the plaintiff in error, in the proceedings in the state court, claimed any "title, right, privilege or immunity under the constitution, or any treaty, or statute of, or commission held or authority exercised under the United States", nor that the decision was against any such title, right, privilege or immunity so specially set up and claimed by him.

The only reference to any such right, privilege or immunity made by him in the state court was the general one that the allowance of the plea of privilege as a defense to his action was a violation of the Fourteenth Amendment, and deprived him of his property without due process of law.

Whatever view may be entertained of the soundness of the rule of law enunciated by the state supreme court, holding that pertinent and material statements made in the pleadings in judicial proceedings before a court of competent jurisdiction are absoluteby privileged, it is manifest that there is no federal statute nor constitutional provision which guarantees a citizen immunity from such a defense, nor which confers on him a right to recover damages notwithstanding such privilege. The doctrine of privileged communications, as stated in the state supreme court in this case, rests

upon public policy, "which looks to the free and unfettered administration of justice". Whether the best interests of the citizens of the state will be subserved by allowing free and untrammeled access to its courts by suitors, witnesses and counsel, unfettered by fears of prosecution for libel, is a question of state policy to be determined by the state tribunals. No question of a title, right, privilege or immunity under the Federal Constitution is involved in its determination. Under the general law, as announced in the state supreme court, the plaintiff in error had no right of action; the use and publication of the words complained of under the circumstances shown in the record gave him no right of action under the general laws of the state; consequently he was not "deprived" of any property by the decision. No federal statute creates any right of action for damages suffered from a defamatory publication; if any such right exists, it is by virtue of the common law of the state, or some statute of the state; and, whether in a given case, or in a given state of facts, such right of action does exist is determined by the laws of the state. What those laws are (whether statutory or of common law origin) are questions belonging to the state tribunals. If the state tribunals erroneously decide questions of general law, that fact affords no ground for a writ of error from this court. "The decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

Sayward v. Denny, 158 U. S. 180.
Sevier v. Haskell, 12 Wall. 12.

It not only appears from the record that no title, right, immunity or privilege under federal statutes or the constitution was set up or claimed by the plaintiff in error in the state supreme court, other than the general claim that the allowance of the defense of privilege deprived him of his property and violated the fourteenth amendment, but it is equally apparent that no such title, right, privilege or immunity was set up or claimed by him in the state superior court. There is no suggestion in the pleadings of any right or privilege claimed under federal law save the general one above mentioned. Before this court will entertain writ of error to the state supreme court, it must be shown by the record that some title, right, privilege or immunity under the constitution, or a treaty, or some statute of the United States was specially set up or claimed in the trial court, and that the decision of that court was adverse to such claim.

Spies v. Illinois, 123 U. S. 131, 181.
Miller v. Texas, 153 U. S. 535.

If the allowance of the defense of privilege to an action of this character could in any view be considered as depriving the plaintiff of his property, it certainly cannot be claimed that the proceedings in the state court were not "due process of law", within the meaning of the constitution. Mere error in the decision of the state court, if admitted, would not deprive the pro-

ceeding of its character as due process of law, nor authorize a review thereof by this court.

Kennard v. Louisiana, 92 U. S. 481.
Sayward v. Denny, supra.
Central Land Co. v. Laidley, 159 U. S. 535.
Miller v. Texas, 153 U. S. 535.

The state court held that the circuit court of the United States had jurisdiction of the suit of the banking association against Wade and others; but that decision did not involve the validity of any federal statute, nor any right claimed by plaintiff in error under it, so as to authorize a review by this court.

Schuyler etc. Bank v. Bollong, 150 U. S. 85.
Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

The adjudication by the state court of the fact that the words complained of were used or published under such circumstances as to give the defendants immunity under the plea of privilege, involved no denial of any right claimed under the fourteenth amendment, although the determination of the question of the jurisdiction of the circuit court of the United States may have involved a consideration of the federal statutes. The decision, in so far as it involved a construction of the banking statutes, sustained those statutes. The plaintiff in error set up no claim to any title, right, privilege or immunity under any federal statute involved in the determination of that colatteral question,

and hence can claim no right to review that decision by writ of error. He does not claim that he had a right of action in this cause by virtue of any federal statute which has been denied him by the state court; nor does he claim that there is any federal statute which gives him immunity from the defense of privilege. No federal law is referred to by him in the proceedings below except the fourteenth amendment; and, as has been often held by this court, that amendment does not entitle a citizen to a writ of error from this court to review a decision of a state court based on principles of general law. It is not sufficient to invoke some provision of the federal constitution; the record must show that some real right or privilege claimed under the constitution or statute was in fact involved and determined adversely to such right so specially set up in the court below.

Fort Smith Ry. v. Merriam, 156 U. S. 478.
Powell v. Brunswick Co., 150 U. S. 433.
Clarke v. McDade, 165 U. S. 168.
Schuyler National Bank v. Bollong, 150 U. S. 85.

II.

ARGUMENT ON MOTION TO AFFIRM.

If the writ of error is not dismissed, we respectfully urge that the judgment of the state supreme court should be affirmed.

I.

If the jurisdiction of this court is maintained on the ground that the finding or decision of the state court to the effect that the circuit court of the United States had jurisdiction of the cause in which the words complained of were used involved a federal question and was adverse to some right or privilege claimed by the plaintiff in error thereunder, we submit that the decision of the state court on that point was so clearly right as to require no further argument. The action in the circuit court was a suit in equity instituted by the National Bank of Commerce, a banking association organized under the national banking laws, against its former officers and managing directors, alleging acts of misfeasance and non-feasance on their part in violation of the restrictions and limitation prescribed by those laws for the management of such institutions, and seeking a recovery for the losses incurred by the association by reason of such violations, as well as by reason of negligent conduct falling short of the measure of diligence prescribed by the banking statutes. Whether the acts charged against such officers constituted violations of the national banking laws or not depended on the

proper construction of those statutes, and presented a federal question which gave the circuit court jurisdiction. The jurisdictional question was presented in that case by demurrer, and the jurisdiction of the court was sustained. See,

Bank v. Wade, 84 Fed. 10.

The very satisfactory opinion rendered by the learned judge in that case makes it unnecessary to enlarge on the question now. But the question before the state court and which it decided was, not whether the facts set up in the bill in equity in the federal court made a technical case upon which that court would grant relief, but whether the circuit court of the United States is a competent court for the trial of causes in equity involving breaches of duty and violations of federal statutes by officers of national banking associations. The averments of the bill in this particular case may have been insufficient to sustain either the federal or the equitable jurisdiction of the court; and yet, if it was a court of competent jurisdiction to try causes of equitable cognizance or causes involving the construction of federal banking statutes, it was a court of competent jurisdiction within the meaning of the rule relating to the privilege in judicial proceedings. It is jurisdiction of the general *subject* that is meant; the privilege obtains although the allegations in the pleadings of the particular case may be insufficient to sustain the jurisdiction or to obtain the relief sought.

Wilson v. Sullivan, (Ga.) 7 S. E. 274,

cited with approval by the state supreme court in the case at bar.

2.

The decision of the state court upon the main question is so abundantly fortified by the authorities there cited, that no argument is needed to sustain it. Indeed, we doubt whether in the whole range of English or American jurisprudence a single reputable authority can be found that denies the privilege under the circumstances found by the state court to exist in this case. The principle upon which the state court placed its decision has been sustained by this court in Vogel v. Gruaz, 110 U. S. 311; and that decision is a complete answer to the proposition that the allowance of the defense of privilege is a deprivation of one's property without due process of law, within the meaning of the fourteenth amendment.

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